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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *Petitioner,*

v.

HYDROLEVEL CORPORATION *Respondent.*

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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MEMORANDUM OF THE SOCIETY OF MANUFACTURING ENGINEERS AS AMICUS CURIAE

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MEMORANDUM OF THE SOCIETY OF MANUFACTURING ENGINEERS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Society of Manufacturing Engineers ("SME"), of Dearborn, Michigan was founded in 1932, and is a non-profit volunteer organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. The purpose for which SME was founded is to promote and actively engage in research, writing, publishing and disseminating knowledge within the field of manufactur-

ing engineering. SME is the parent association of four sub-associations: Robotics International of SME; Computer and Automated Systems Association of SME; Association for Finishing Processes of SME and the North America Manufacturing Research Institution of SME. Collectively, these groups have over 60,000 individual members, who are predominantly engineers.

SME's services to its members are somewhat different in nature than those afforded by Petitioner to its members. In addition to offering continuing education to engineers, ASME develops standards[1] and guidelines involving both consumer and commercial products and tools of the trade used by engineers and manufacturers. SME, on the other hand, is almost exclusively concerned with the publication and dissemination of information to its members. Toward this end, SME publishes books and journals and holds over 150 technical meetings annually designed to inform members of new advances in the field of manufacturing.

A quarterly journal called *Robotics Today* is published by SME as is a monthly magazine entitled *Manufacturing Engineering*, which has a circulation of over 100,000. Largely through efforts of its volunteers, SME arranges from twenty to twenty-five educational expositions per year, both in the United States and abroad. These educational expositions are for the benefit

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[1] The holding below is certain to have numerous adverse affects on voluntary membership associations involved in promulgating standards. A standard is a description published by an association, detailing in layman's terms, certain characteristics of products. Standards are helpful both to consumers and manufacturers alike since they make available useful information concerning the safe use and construction of products. Such topics as strength, safety and performance are addressed in a typical standard.

of engineers and manufacturers and typically exhibit new equipment from several hundred sponsoring companies in those fields.

SME maintains 235 chapters around the world, as well as 86 subchapters and 97 student chapters.

The present case presents an unconventional and potentially harmful precedent as to the antitrust liability of professional associations. SME and many other associations stand to suffer great losses both in the voluntary support of individual members and in the operation of services unless the panel's decision is reviewed and overturned. As the arguments which follow point out, there would be too many risks of liability involved in serving a professional organization if the reasoning of the Second Circuit is allowed to prevail. SME believes that its experience and comments will provide this Court with helpful insight in addressing the issues raised.

INTRODUCTION AND SUMMARY OF ARGUMENT

The present case raises significant questions both as to the liability of professional associations for the unlawful acts of their agents, who while acting within the scope of apparent authority, violate antitrust laws, and as to the meaning of such terms as "contract," "combination" and "conspiracy" as those terms apply to antitrust litigation.

The Court of Appeals decision, by establishing a new standard for determining antitrust liability, will undermine the nature of professional associations which depend on the voluntary participation of their members. Moreover, since this new standard is derived from an intentional tort nexus which until now has been inap-

plicable to an association's "unintentional participation" in an antitrust conspiracy, it is unclear how it will work out in practice.

If allowed to stand, the decision of the Second Circuit will invite a multitude of lawsuits against voluntary associations and cause confusion among such organizations and the public as to the extent of potential liability of associations and their volunteers. The Court must assess whether such additional litigation and uncertainty is desirable or necessary in light of the already burdened condition of the judicial system and of the sound principles of agency law which presently exist and which have guided the activities of professional associations for decades.

ARGUMENT

I. This Court Should Grant Certiorari To Determine The Standard Of Liability Appropriate For A Professional Association Whose Members Conspire To Violate The Antitrust Laws Without The Knowledge Or Support Of The Association And Without Intending To Benefit The Organization.

Of universal concern to professional associations, including SME, is the impact of the panel's decision on the ability of such organizations to function normally without fear of unfounded antitrust reprisals. Specifically, the sweeping abandonment of established case law defining the conditions under which a voluntary association may be held liable for violations of the Sherman Act necessitates further judicial review of the principles set forth by the panel.

For decades, associations have relied on the premise that where an agent acts unlawfully without intending to

benefit his principal, the principal cannot, without ratifying those acts, be held accountable for them. *See*, e.g., *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922); *United States* v. *Hilton Hotels Corp.*, 467 F. 2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); These decisions agree that there must exist some kind of actual authority on the part of, or benefit accruing to, the principal before liability can arise. An alternative requirement, as, for example, when an organization ratifies the unlawful act of one of its agents thereby condoning it, is based on sound and established agency principles. The panel, through a novel gloss on the law of agency, now seeks, to change the standard of liability whereby a principal would be liable for unlawful behavior of agents who act within the scope of apparent authority. Its reasoning depends largely on narrow agency and tort precepts that have never before been applied to the antitrust arena. The panel would cast aside the ruling case law in this area, including important decisions by this Court, in favor of a standard which depends for its credibility on misapplied examples in the Restatement 2d of Agency and on one decision involving a bill of lading which has nothing whatever to do with antitrust law.

A rule of law establishing liability without fault in antitrust cases would call into question the very meaning of the requirement that those charged with violation of the Sherman Act must form a "conspiracy," "contract" or "combination." This Court has held on numerous occasions that in order to have a conspiracy or combination, there must be a "unity of purpose" or "common design," *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); or "*at least* the degree of criminal intent necessary for the substantive

offense itself." *Ingram* v. *United States*, 360 U.S. 672, 678 (1959). This Court has repeatedly held that no contract, combination, or conspiracy can exist for purposes of the Sherman Act unless there has been concerted action by two or more parties. *Cement Mfrs. Protective Ass'n.* v. *United States*, 268 U.S. 588, 602-06 (concerted action not shown and no unlawful restraint accrued); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 144 (1968) (White, J., concurring).[2] Under the panel's reasoning, an association such as SME would be held accountable for antitrust violations even if it neither participated in a common design nor performed a single critical act with a specific intent of accomplishing that act; even if it was without knowledge of the act and was incapable of benefitting from it. Thus, it could be held to violate the antitrust acts even without conspiring, contracting or forming a combination with anyone for that purpose. Since one man standing alone cannot be a conspirator, the panel's reasoning will surely lead to incongrouous results for associations such as SME.

The decision below deviates even further from classical antitrust and agency theory in its determination that ASME was an unintentional participant in its agents' conduct. (A:26, 635 F.2d at 131). A theory of negligence is out of place in antitrust law.

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[2] This principle was followed in *United States* v. *Corn Derivatives Institute*, 1932-1939 Trade Cas. ¶ 55,002 at 18 (N.D. Ill. 1932) where the court held that "the words 'acting in concert' as used in this decree shall mean by mutual agreement, understanding, plan, device, or contrivance entered into or employed by any two or more defendants. . . ."

Because the Sherman Act assesses treble damages, courts must avoid standards of liability that are illogical or confusing, and instead, apply standards that have a sound basis. To do otherwise would be to subject innocent parties to harsh and inequitable penalties.

II. Third Persons Harmed By The Illegal Acts Of Agents With Apparent Authority To Act On Behalf Of Their Principals Presently Have An Adequate Remedy.

The antitrust laws already provide a remedy for competitors injured by the acts of fellow competitors who are also officials of professional associations. In the case below, the agents acted to benefit not the American Society of Mechanical Engineers but their own corporations. The sole remedy should be against the true principle of the wrong doers: their corporate beneficiaries. Certainly, the purposes of the antitrust laws would then be more fully served. The public is not protected, indeed it is harmed, when liability is imposed on innocent parties, especially when those parties are voluntary organizations existing to maintain safety and responsibility in the market place. Punishment in such cases should be directed not at the activities of the organizations but, at the parties responsible for the harm.

III. The Court Should Grant Certiorari To Review The Impact Of The Panel's Decision On The Interpretation And Dissemination Of Professional Knowledge By Associations.

Professional associations which serve their members and the public by publishing standards and professional knowledge should not have their freedom to publish restrained simply because a few of their agents are in a position to misuse the publication process. The Second Circuit announced that "[I]mposing liability on the prin-

cipal will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance" (A:14, 635 F.2d at 125). This is a potentially dangerous and overly restrictive method of curbing misconduct by agents of an association. First, it severely limits the ability of an organization to freely publish guidelines for the members it serves. If the publishers of newspapers and other periodicals were held liable for every instance of employee misconduct, few entities would be willing to take the risks involved in exercising free speech. Second, the limitations imposed by the panel would result in the type of restraint which this Court has long condemned. Though the First Amendment does not protect acts of fraud, it does assure an unfettered interchange of ideas, *Roth* v. *United States*, 354 U.S. 476 (1957) and the widest possible dissemination of information *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). This freedom would be unreasonably restrained if organizations were unable to publish the opinions and standards required by their members and the public because a novel and heretofore unaccepted standard of antitrust liability rendered all such speech too risky.

IV. The Court Should Grant Certiorari To Prevent A Burden Of Unnecessary And Time Consuming Litigation.

The panel's decision will spur litigation from associations and business organizations which in the past have relied upon well established principles of agency law. Organizations affected by the increased liability will seek redress and clarification in the courts. This litigation burden can and should be avoided. A review of the Second Circuit's opinion would provide the interpretation and clarification necessary to prevent excessive litigation.

V. The Court Should Grant Certiorari To Review The Impact The Panel's Decision Will Have On The Liability Of Voluntary Organizations.

There are persuasive legal arguments why a non-profit, voluntary membership organization should not be found liable for the unauthorized acts of its volunteers which do not benefit the association, and are taken without its knowledge. There are also important philosophical and policy implications of the panel's opinion because it significantly expands the potential liability of voluntary associations, thus potentially making it impossible for these associations to perform services for their members and the public.

A. Voluntary Associations Are Essential To The Maintenance Of Individual Freedom And The Functioning Of A Democrary.

Voluntary associations have long held a distinguished place in American history.[3] They are the outgrowth of the unprecedented freedom enjoyed by the American people, and are manifestations of the uniquely American awareness that freedom, individualism, and independence, if they are to be meaningful and enduring, must be tempered by restraint, collective action, and unselfish participation. From the American revolution through the present, voluntary professional organizations have overseen the conduct and standards of their constituent professions. In forming such organizations, Americans have prided themselves on their ability to solve problems and serve needs without prodding from a centralized state bureaucracy. Private sacrifice for public good is a concept inherent in all voluntary associations.

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[3] *See*, Webster, *The Law of Associations*, Matthew Bender, 1980 (originally published by the American Society of Association Executives, 1971), Chapter 1.

Many observers have recognized the central importance of voluntarism to a democratic society. Alexis de Tocqueville devoted an entire chapter of his *Democracy in America* to voluntary associations. Throughout this chapter, de Tocqueville marvels at the number and variety of associations that arose in America.

> "As soon as several Americans have conceived a sentiment or an idea that they want to produce before the world, they seek each other out, and when found, they unite. Thenceforth they are no longer isolated individuals, but a power conspicuous from the distance whose actions serve as an example; when it speaks, men listen."[4]

He saw a direct correlation between the myriad of associations in America and the spirit of equality that pervaded the nation. De Tocqueville realized that democracies consist of many individuals who by themselves are "independent and weak," and able to "do hardly anything for themselves."[5] He concluded that where political and economic power is decentralized, individuals have no choice but to learn some habits of acting together in the affairs of daily life;"[6]. Indeed,

> "In democratic countries, knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all the others. . . If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads."[7]

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[4] Alexis de Tocqueville, *Democracy in America*, edited by J. P. Mayer and Max Lerner, New York: Harper & Row, 1966, 488.

[5] De Tocqueville, 488.

[6] De Tocqueville, 488.

[7] De Tocqueville, 488.

In de Tocqueville's opinion, an association voluntarily entered into by individuals is far superior to the government in undertaking important enterprises.

> [Many of my contemporaries] claim that as the citizens become weaker and more helpless, the government must become proportionately more skillful and active, so that society should do what is no longer possible for individuals. They think that answers the whole problem, but I think them mistaken. The more government takes the place of associations, the more will individuals lose the idea of forming associations and need the government to come to their help. . . Must the public administration cope with every industrial undertaking beyond the competence of the individual citizen? . . . The morals and intelligence of a democratic people would be in as much danger as its commerce and industry if ever a government wholly usurped the place of private association.[8]

In short, de Tocqueville believed that private voluntary associations are not only more efficient than the government, but also more supportive of a vigorous, free, well-informed, and generous citizenry.

Partly as a result of de Tocqueville's observations, this Court has extended First Amendment protection to the right of association. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937). As with freedom of speech and press, any law infringing upon an individual's right to associate is subject to strict judicial scrutiny. The fact that association has been given the full protection of the First Amendment is evidence of its supreme importance in American life.

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[8] De Tocqueville, 487.

B. The Panel's Decision Will Prevent Voluntary Associations From Serving Their Historical Functions.

The panel's decision extends the potential liability of voluntary associations to an unprecedented and dangerous degree. By the panel's reasoning, a voluntary association is liable under the Sherman Act for illegal conduct of a volunteer member, even if the association disapproves, has no knowledge or is deceived of what the member is doing, and is in no way benefitted by the member's actions. Of course, if found liable under the Sherman Act, an association will have to pay treble damages.

Adherence to the panel's reasoning will effectively put an end to many association functions since many are likely to conclude that the benefits flowing to the public from their activities do not warrant assumption of the disproportionate risks and burdens imposed by the panel's decision.

There are four issues in particular which require review of the decision below by this Court. First, if the Circuit Court's decision is allowed to stand, private organizations will be unable to contend with the administrative burden of policing each of their volunteer members to ensure that none are engaged in illicit activities. To detect wrong-doing, organizations will have to monitor all of the activities, affairs, correspondence, and transactions of all members. No voluntary association, with its limited budget and human resources, can hope to accomplish such a task. Second, organizations that presume to inspect the private business of their individual members will be less attractive to potential members. An advantage of working through a voluntary association, as opposed to the government, is the more

informal, streamlined approach it allows individuals in problem solving. Members of such organizations presently enjoy the privacy to freely exercise their professional judgment within the guidelines established by their associations. If, however, individuals are subject to constant monitoring from their organizations and are required to adhere to a series of meddlesome regulations, these advantages will significantly diminish. Third, the panel's decision will encourage potentially frivolous suits against voluntary associations. Such actions are likely to be brought by parties who lack strong positions on the merits but who nevertheless will assume the risk of litigation in hopes of winning treble damages. Even if most of these suits are unsuccessful, the costs of defending against them will be enormous. Finally, the decision will discourage volunteer efforts by individuals fearful of exposing themselves to liability, and will induce many employers to forbid their employees to participate in an organization's activities.

C. The Panel's Decision Could Deprive the Public of Many of the Practical and Philosophical Benefits Derived from Voluntary Associations.

As voluntary associations abandon their former roles in response to the panel's decision, their functions will be either discontinued altogether or assumed by federal, state, and local governments. One does not have to agree with de Tocqueville that "knowledge of how to combine is the mother of all other forms of knowledge" to see that associations are responsible for innumerable benefits to society, and that in their absence, many of the tasks businesses and individuals now take for granted will go undone. Certainly, the performance of many industries, which will be deprived of the data and technical information presently made available by associations,

will decline. This is unfortunate, for productivity is already at a low ebb in this country. The lack of ethical guidelines, meanwhile, will no doubt cause confusion among professionals and business executives.

Government assumption of association tasks is not a promising prospect. With respect to the promulgation of standards and codes, for example, no government can be expected to establish regulations of the quality and thoroughness maintained by the private organizations. The government, after all, has little familiarity with subjects as specialized as safety in the engineering profession, and would likely devote neither the time nor the money necessary to ensure the development of reasonable and sound standards. To the extent that the government could promulgate adequate standards, the taxpayer and consumer will suffer. An added layer of bureaucracy—engineers, lawyers, scientists—would be created to process, research, draft and distribute the regulations. This, of course, would increase taxes, paperwork and the overall administrative burden on the average citizen. On a practical level the government would be vastly inferior to private organizations in setting, administering, and interpreting safety standards for the mechanical engineering industry.

Aside from practical considerations, the Court must be concerned with the philosophical issues discussed by de Tocqueville. The judiciary must cast a wary eye on developments which in the long run threaten to result in government encroachment on the rights of the individual. If allowed to stand, the panel's opinion will do just that. The decision will discourage individuals associated with a particular industry or corporation from banding together in an effort to serve a vital need of that industry or profession. The resulting vacuum, if

filled at all, will be filled by government. The inevitable consequences of such a result portend a society where, due to restraints imposed upon the right of association, individuals become incapable of acting on their own behalf and where government is free to assume responsibility formerly held by voluntary organizations. The dependence on government by individuals would therefore increase, and the cycle of which de Tocqueville warned will have come true. Every such completed cycle makes the private individual slightly less independent, vigorous, and magnanimous, and the central authority slightly more cumbersome, inefficient, and overweaning. The net effect is a gain of government at the expense of private citizens.

This Court has consistently reaffirmed the principles and spirit of free association and independent organizations. Now these principles are imperiled because of the Second Circuit's decision; a decision which, if the rights of individuals to associate with one another are to remain viable, this Court must review.

CONCLUSION

For the reasons stated herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

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